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THE CLAYTON LAW—AN IMPERFECT SUPPLEMENT TO THE SHERMAN LAW.

ON OCTOBER 15, 1914, the President of the United States approved and signed an Act passed by the Sixty-third Congress entitled "An Act to Supplement Existing Laws against Unlawful Restraints and Monopolies, and for Other Purposes." The Act thus approved is commonly known as the Clayton Law, and, as its quoted title indicates, it is intended to be, and is in fact, a supplement to the Sherman Anti-trust Law. It constitutes the first statutory addition to the Sherman Anti-trust Law (approved July 2, 1890). It therefore embodies, or may be presumed to embody, the result of nearly twenty-five years of experience under the Sherman Law.

An adequate consideration of the purpose and meaning of the Clayton Law as a supplement to the Sherman Law will necessitate an examination of the conditions which brought about the enactment of the Clayton Law. This is particularly true for the reason that in the comparatively brief period which has elapsed since the enactment of the Clayton Law no cases have arisen in the courts under the new Law to which resort may be had for judicial interpretation with respect to its origin, scope and purpose. Accordingly it becomes necessary to make a somewhat historical investigation of the conditions which brought about the enactment of that Law and of the manner in which Congress has sought to meet those conditions.

The Sherman Law, in its development in the courts, went through a series of epochs which may with measurable accuracy be separated and defined.

Prior to the enactment of the Sherman Law in 1890, there existed no federal statute with relation to the prevention of trusts and monopolies, and, by virtue of the fact that the federal jurisprudence does not recognize the common law with respect to the punishment of crimes, there was no statutory power in the Federal Government to punish persons for committing acts which at the common law constituted unlawful restraints of trade. During the period of nearly twenty years prior to the year 1890, there had arisen in this county a marked tendency towards the aggregation of capital into a few corporations possessing large resources and substantially controlling, or attempting to control, various important branches of trade and commerce. The example upon which this tendency rested was the Standard Oil Company. This company had gained a substantially preponderant position in the oil business of this country. It sought to centralize and make more efficient the control thus possessed by the creation of a trust arrangement, which, it may be said in passing, was the inception of the use of the word "trust" in connection with large aggregations of capital. This trust arrangement consisted in the designation of certain individuals as trustees, to whom the various stockholders of the affiliated corporations surrendered their certificates of stock in perpetuity, receiving in turn trust certificates entitling the holders to ratable shares of the earnings of the aggregated corporations. The result of this arrangement was, as was intended, to give to the trustees effectual control of the operations of all of the aggregated companies. It was charged that the power thus gained was greatly abused, and strong public protest arose in various States of the Union and in Congress against this abuse. The result was that suits were brought to dissolve the trust, the most notable of these suits being that brought by the Attorney-General of the State of Ohio in which a dissolution of the trust was prayed for and was granted by the Court.[1]

A similar situation existed in the sugar industry, which had likewise fallen under the control of a number of aggregated corporations. A suit was brought by the Attorney General of the

[1] State ex rel. Attorney General *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279.

State of New York to dissolve the combination thus formed, and the Court of Appeals, of New York, in a notable decision, decreed its dissolution.[2]

Similar litigation took place with respect to the so-called Whiskey Trust, which was likewise decided adversely to the defendant.[3]

In these and other similar cases, the decisions of the courts strongly condemned the monopolistic practices involved and declared them unlawful. They were all brought, however, under state statutes, and the effect of the court's decisions was necessarily limited to the jurisdiction of the particular state in which the decision was rendered. In each instance advantage was taken of this fact and the effect of the courts' decision rendered nugatory, through the fact that the particular trust thus declared unlawful obtained a charter in another state and resumed in substantially the same form the practices which had been declared unlawful.

It thus became evident that the only effective way to repress these monopolistic aggregations was by the enactment of a federal statute which would make impossible the evasion and circumvention previously practiced.

On August 14, 1888 Senator Sherman of Ohio introduced in the Senate of the United States a bill which was the basis of the law enacted on July 2, 1890 and thereafter known as the Sherman Anti-Trust Law.

As has been stated, the Sherman Law went through various sharply defined epochs of development. The scope of this paper will not permit a proper presentation of these periods of development.[4] It must suffice to say that during the earlier years of the existence of that law, which has since become a most important, if not the most important, statute with respect to the substantive law affecting the trade and commerce of this country, the courts treated it in a manner which deprived it of all its vitality as a remedial or repressive statute. It was not until

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[2] People *v.* North River Sugar Refining Co., 121 N. Y. 582, 24 N. E. 834.

[3] State *v.* Nebraska Distilling Co., 20 Neb. 700, 46 N. W. 155.

[4] See article, "The Federal Anti-Trust Law and the 'Rule of Reason,'" by the writer, 1 VA. L. REV. 188.

the year 1899 that the Supreme Court, in the Addyston case,[5] gave to it an interpretation which foreshadowed the later powerful force which the statute now possesses. Subsequently, in 1904, in the Northern Securities case,[6] the Supreme Court reasserted the drastic force of the Sherman Law; and finally, in the year 1911, the Supreme Court disposed of any doubt as to the potency of the Sherman Law to cope with monopolistic combinations by its celebrated decisions in the Standard Oil case[7] and in the Tobacco Trust case.[8]

It may be asserted with as much historical accuracy as is compatible with such an assertion, that the Clayton Law and its sister law, the Trade Commission Law, were the immediate outgrowth of the public discussions and the Congressional debates which were brought about by the decisions of the Supreme Court in the two last-named cases. In those cases the Supreme Court adopted a rule of interpretation whereby the Sherman Law was construed in a manner which has been generally designated as "the light of reason," from which phraseology has arisen the now well-known term "the rule of reason." This rule was invoked by the Supreme Court for the purpose of enlarging the scope of the Sherman Law. Unfortunately, however, in the administrative process of dissolving the two trusts affected by those decisions, the mandates of the Supreme Court requiring such dissolution were executed in such a manner as to cause general disapproval. A widespread belief arose to the effect that the cause for the unsatisfactory results thus obtained was to be found in a supposed weakness of the Sherman Law—a weakness generally believed to be made apparent or to be accentuated by the Supreme Court's resort to the "rule of reason."

Popular protest was made against the dissolution of the two trusts in question, and these protests found expression in the National Platform of the Democratic Party adopted at the Baltimore Convention in 1912, which contained the following statement:

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[5] Addyston Pipe and Steel Co. *v.* United States, 175 U. S. 211.
[6] United States *v.* Northern Securities Co., 193 U. S. 197.
[7] Standard Oil Co. *v.* United States, 221 U. S. 1.
[8] United States *v.* American Tobacco Co., 221 U. S. 106.

> "We regret that the Sherman Anti-Trust Law has received a judicial construction depriving it of much of its efficiency, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretations."

This authoritative pronouncement of one of the great political parties, followed as it was by its quasi-approval by the people at the ensuing election at which the Presidential candidate of the Democratic Party was elected, proved to be the basis of the legislation culminating in the Clayton Law and the Trade Commission Law.

The essential element in the political declaration above quoted was that the Sherman Law had been weakened, or, as the phrase then ran, "emasculated," by the decisions of the Supreme Court in the Oil case and the Tobacco case. This criticism was unfounded. A uniform course of decisions by the Supreme Court since 1911 shows that the "rule of reason" was invoked in those two cases, not for the purpose of narrowing the scope and force of the Sherman Law, but for the purpose of enlarging the same, and that in later decisions the Sherman Law was enforced with a degree of rigor which approximated the maximum power of the law. It was due to the fact that the mandates of the court in those two cases were improperly executed, and not because of any weakness in the construction placed upon the Sherman Law, that the dissolution of the two great trusts affected met with widespread and just censure. Nevertheless, the people at large believed that the law had proved ineffective and demanded that it should be strengthened.

On the other hand, widespread protest arose upon the part of moderate-sized business units to the effect that the interpretation placed by the Supreme Court upon the Sherman Law had brought within its scope not merely great aggregations of capital in the form of trusts, but had likewise brought within its prohibitions, co-operative agreements among moderate-sized business competitors where monopoly was neither possible nor desired. These protests found expression in the assertion that moderate-sized business units did not know "what they could do or what they could not do" under the Sherman Law. As a mat-

ter of fact, this assertion was likewise fallacious, for it was not correct to say that moderate-sized business units did not know what they could do or what they could not do under the Sherman Law with respect to entering into co-operative agreements, but, rather, to say that moderate-sized business units could not, under the Sherman Law, do anything at all in the nature of co-operative agreements. In whatever form, however, the protests on the part of moderate-sized business units were made or should have been made, the fact remained that the Sherman Law, as a result of the drastic interpretation placed upon it by the Supreme Court, forbade co-operative agreements among competitors and thereby negatively required the exercise of competition, even though it should reach a ruinous state or the state popularly known as "cut-throat competition."

Here were, then, the two opposing schools of thought which arose after the rendition of the decisions in the Oil and the Tobacco cases.

Briefly stated, they were, on the one hand, a demand for additional legislation to strengthen the supposed weakness of the Sherman Law, and, on the other hand, a demand for a relaxation of the rigor of the Sherman Law so as to permit beneficial co-operation. It is not surprising that legislation designed to meet these conflicting demands should prove to be confusing and, in large measure, futile and nugatory.

On January 20, 1914, the President of the United States, apparently intending to meet the situation thus created, delivered a message to the Congress in which he recommended additional anti-trust legislation. In this message he said:

> "The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing anti-trust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed.

These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.

"And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.

"The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case."

The substance of the President's recommendations was, first, the enactment of laws to give "further and more explicit legislative definition of the policy and meaning" of the Sherman Anti-trust Law; and, second, the establishment of a commission to which business men could resort in order to obtain "advice, definite guidance and information."

The Clayton Law was enacted by Congress in response to the first of these two recommendations; and the Trade Commission Law in response to the second.

Thus far, the only adjudicated case in which the Clayton Law has been considered is the Great Atlantic & Pacific Tea Company *v.* Cream of Wheat Company.[9] That decision is, however, not useful for the present purpose, inasmuch as the court decided the case rather upon general principles of law than upon any particular interpretation of the Clayton Law.

It seems to be a proper assertion to say that neither the Clayton Law nor the Trade Commission Law has in any proper sense

[9] 224 Fed. 566, affirmed 227 Fed. 46.

met the situation which existed at the time of their enactment, nor the situation declared by the President in his address to Congress; and, indeed, it seems safe to assert that neither of these laws has proven useful in clearing up or removing any of the defects, real or supposed, in the Sherman Law. Want of space forbids a detailed examination of the particular provisions contained in these two statutes. A cursory examination of them will reveal that in the Clayton Law there are only two sections, namely, Section 2 and Section 3, which are designed to strengthen the Sherman Law and likewise to give "more explicit legislative definition" of the meaning of the Sherman Law. A study of the decisions of the Supreme Court under the Sherman Law will show that neither of these two sections was needed in order to strengthen the Sherman Law, for that law, under numerous decisions, contained full power to prevent the practices which the two sections of the Clayton Act above-mentioned sought to prevent; and such study will further show that no provision, either in the Clayton Law or the Trade Commission Law, furnishes any method by which the business men of the country can obtain "advice, definite guidance and information."

The necessary limits of this paper prevent more than a mere mention of other provisions of the Clayton Law, such as provisions intended to prevent interlocking directorates and holding companies and likewise designed "to make guilt personal," by subjecting to personal punishment the individuals who participate in unlawful restraints of trade practised by corporations. It may be again asserted, as coming well within the limits of numerous authoritative decisions of the Supreme Court, that neither of these three provisions was necessary to meet any real defect in the Sherman Law, for such decisions plainly show that under the Sherman Law, and prior to the enactment of the Clayton Law, ample power existed to accomplish each of the purposes intended to be accomplished by these three provisions. With respect to the remaining provision in the Clayton Law, namely, that intended to meet the demands of the labor organizations of this country for relief against the supposed oppression of the Sherman Law and for relief against what has been designated "legislation by injunction," it must likewise suffice to say that in

neither respect has the new law proven to be useful. In order to meet the proper criticism that such assertion is dogmatic in nature, it must be stated that the limits of this paper will not permit of a detailed presentation of the grounds upon which such assertion is based. For the present purpose sufficient justification for the assertion must be found in the decisions of the Supreme Court under the Sherman Law, which will reveal the full exertion of the force of the Sherman Law against combinations of capital and a very rare exertion of its power against combinations of labor; and with respect to the further provision in the new law designed to prevent "legislation by injunction," resort must be had to the language of Sections 17-25 to show that there has been no substantial or practical modification of the previously existing body of substantive law with respect to the issuance of injunctions in labor disputes. This phase of the subject is, however, of too complicated and detailed a nature to permit of an adequate consideration within the limits of the present paper. It ought properly to be the subject of a separate discussion.

Briefly summarizing the subject, it therefore appears that, prior to the enactment of the Clayton Law, the Supreme Court, through a series of decisions, had clearly and strongly shown the complete power of the Sherman Law to carry out the sole purpose for which it was enacted, namely, the repression and prevention of monopolistic aggregations of capital. There existed, therefore, no need of any additional legislation to make more clear the policy and meaning of that law. The demand for such additional legislation rested upon an uninformed though general demand which was based upon a misconception of the meaning of the decisions of the Supreme Court in the Oil case and the Tobacco case. This misconception grew out of the popular misunderstanding of the "rule of reason" invoked by the Supreme Court in those two cases. Coincident with this misconception, there arose in the business community a demand diametrically opposed to the demand based upon the misconception above-mentioned. That part of the business community which was not engaged in monopolistic practices complained that the Sherman Law had been given a drastic interpretation which se-

riously hampered the moderate-sized business units of the country, and asked for legislation which would mitigate that rigor. Amid these conflicting demands the President laid the subject before Congress, and the debates which ensued were a natural reflection of the contradictory views upon which the new legislation was sought. The result of these debates was the enactment of the Clayton Law and the Trade Commission Law. It is but a natural consequence that the expert study which has been given to these new laws during the period of nearly one year and a half which has now elapsed since their passage shows that they are most imperfect, and instead of accomplishing their declared purpose of making clear the policy and meaning of the Sherman Law and of affording the business community a tribunal to which it could resort for "advice, definite guidance and information," the new laws have to an appreciable extent confused the situation and have proven to be of no substantial benefit.

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